IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO.706 OF 1998
IN
ARBITRATION PETITION NO.226 OF 1997
IN
AWARD NO.96 OF 1997

Union of India
through the Chief Engineer,
Western Railway, having
its Office at Western
Railway Headquarters,
Churchgate,
Mumbai-400 020. .... Appellants

- Versus -

M/s. Ghanekar Builders &
Chemicals Private Limited,
128, Kotnis Road, Mahim,
Mumbai-400 016. .... Respondents

Mr. Suresh Kumar, Advocate, for the Appellants.

Mr. D.D. Madon, Senior Counsel, with Mr. C.S. Kapadia and Ms Trupti Shetty i/b M/s. Dhruve Liladhar & Co. for the Respondent.

CORAM: R.M.S. KHANDEPARKAR &
Dr. D.Y. CHANDRACHUD, JJ.

DATED: JANUARY 10, 2007

ORAL JUDGMENT (Per Dr. D.Y.Chandrachud, J.):

1. A Petition was instituted for challenging an arbitral award governed by the provisions of the Indian Arbitration Act, 1940. A learned Single Judge of this Court, by his Judgment and Order dated 18th November, 1997, did not find any merit in the grounds urged under Section 30 for impugning the validity of the award. An

Appeal has been preferred against the Judgment of the learned single Judge in so far as the Court declined to accede to the challenges to the award.

2. On 27th May, 1983, the Chief General Engineer of the Western Railways awarded a contract to the respondents for the work of channelisation of the Mahim Creek. The work involved carrying out protection work for Railway Bridge No.20 between Mahim and Bandra. A formal document evidencing the terms of the contract was accordingly entered into between the parties. The Agreement dated 29th August, 1983, inter alia, contained a provision in regard to the arbitration of disputes. Disputes having been raised by the respondents, a Suit was instituted before this Court under Section 20 of the Arbitration Act, 1940. The Suit was dismissed by a learned single Judge of this Court on the ground that the claim was barred by limitation. In an Appeal filed by the respondents, a Division Bench of this Court directed by an Order dated 15th March, 1995 that the Appellants shall appoint an arbitrator within a period of eight weeks, failing which the respondents were at liberty to move the Court. By a subsequent Order, a further extension of time was granted to the Appellants to appoint an arbitrator within four weeks, failing which it was directed that Shri S.M. Joglekar, a retired Chief Engineer, would stand appointed as the

sole arbitrator. Upon the failure of the Appellants to nominate an arbitrator in terms of the arbitration clause, Shri S.M. Joglekar stood appointed as the sole arbitrator. The arbitrator entered upon the reference. The Union of India had filed a Special Leave Petition before the Supreme Court in order to challenge the order of the Division Bench. The Special Leave Petition was dismissed by the Supreme Court on 4th April, 1997. While dismissing the Petition, the Supreme Court observed that the Union of India had failed to appoint an arbitrator upon which the Order passed by the High Court on 15th March, 1995 had attained finality. The Supreme Court observed that once the Order of the Division Bench dated 15th March, 1995 was not challenged by the Appellants herein, no case for interference was made out for setting aside the consequential Order that was under challenge. While clarifying that the remedies of the parties in respect of the merits of the award would not be affected, the Supreme Court held that the question as to the jurisdiction of the sole arbitrator would remain concluded.

3. The sole arbitrator having entered upon the reference, rendered an award dated 22nd March, 1997. The award was challenged before a learned single Judge of this Court in a Petition under Section 30 of the Indian Arbitration Act, 1940. The Petition came to be

dismissed by a Judgment and Order dated 18th November, 1997. During the pendency of the Appeal, a Division Bench of this Court directed on 14th December, 1999 that the attachment that had been levied in execution of the award shall remain stayed, subject to the Appellants depositing the decretal amount with the Prothonotary and Senior Master. The amount was to be payable to the Respondents, subject to furnishing of adequate security to the satisfaction of the Prothonotary and Senior Master. The Court has been informed that the amount has accordingly been deposited and has been withdrawn by the respondents upon furnishing security.

4. The challenge to the Judgment of the learned single Judge and consequently to the award is that the award is against the provisions of the contract and that the arbitrator had ignored the stipulations contained in the Agreement between the parties that would govern their relations inter se in the execution of the contract. In this regard, it has been urged that the contract in question was a lumpsum contract. Serial No.1 of the job description provided for de-watering including the diversion of streams, providing and maintaining the coffer dam, etc., as may be necessary for the execution of the work. The amount that was stipulated thereunder was Rs.15,00,000/-. The arbitrator awarded an amount of Rs.13,24,120/- on account of the claim under the head of

the additional length of the coffer dam. The submission before the Court is that in awarding an additional amount, the arbitrator has overlooked the contractual condition under which a lumpsum payment of Rs.15,00,000/- was envisaged. The second submission that has been urged is that the arbitrator had erred in awarding an amount of Rs.3,20,000/- for the actual work of extra de-watering. The submission in this regard is that under the special conditions of contract it was stipulated that the payment for de-watering will be made at Rs.40/- per shift limited to a maximum of Rs.6,00,000/- for the entire contract. The special conditions stipulated that the lumpsum payment of Rs.15,00,000/- under Item-1 would be exclusive of de-watering. The parties had laid down a maximum of Rs.6,00,000/- as the upper limit in respect of payment for de-watering. Finally it was urged that the award of interest by the arbitrator is contrary to the provision of Clause 16.2 of the General Conditions of Contract.

5. In considering the submissions that have been urged on behalf of the appellant, it would be necessary for the Court to scrutinise the basis and foundation laid in the pleadings before the learned single Judge in the challenge under Section 30 of the Arbitration Act, 1940. Under the Act of 1940, it was a settled principle of law that an arbitral award could be interfered with on the

ground of an error apparent on the face of the record: where a proposition of law contained in the award or in a document embodied in the award was found to be erroneous. Now a perusal of the Arbitration Petition filed before the Court would reveal that the entire body of facts related to the constitution of the arbitral Tribunal. The gravamen of the submission was that the arbitral Tribunal was not constituted in accordance with Clauses 63 and 64 of the General Conditions of Contract. The second submission in the Arbitration Petition was that on account of the transfer of the officer of the Western Railways, who was attending to the matter, the Appellants had not been able to present their case effectively before the arbitrator. Grounds (a) to (e) in the Arbitration Petition related to the challenge to the constitution of the arbitral Tribunal whereas grounds (f) and (g) related to the refusal of the arbitrator to adjourn the proceedings. Fairly, having regard to the Judgment of the Supreme Court in the proceedings on 4th April, 1997, no submission has been urged before this Court in the present appeal in regard to the validity of the constitution of the arbitral Tribunal or in regard to the manner in which the proceedings were conducted before the arbitrator. The point was urged before the learned single Judge and was negatived. Before this Court in Appeal, the only submission that has been urged is with reference to

ground (h) of the Arbitration Petition. Since one of the principal objections of the respondents is that neither any factual nor legal basis has been made out in the pleadings for a challenge to the award on the ground that the award is against the provisions of the contract, it would be necessary to advert to ground (h) of the Arbitration Petition in extenso. Ground (h) reads as follows:

> "The Learned Arbitrator did not give any reasons in writing for allowing the claim of the claimant vis-a-vis the defence of the Railway Administration. The claim is not admissible. The Ld. Arbitrator did not consider the Written defence of the Railway administration submitted to him. The Ld. Arbitrator also failed and neglected to give him reasons for not considering the counter claim/defence of the Railway Administration. The petitioners submit that the same amount to non-application of mind on the part of the Ld. Arbitrator. The Ld. Arbitrator also failed to give his speaking order in support of the award. Therefore, the award is vitiated to that extent."

Now a perusal of ground (h) of the Arbitration Petition, which is the foundation of the only submission which has been urged before the Court, would demonstrate that the challenge of the Appellants to the arbitral award proceeded on the basis that the arbitrator had not furnished any reasons for allowing the claim of the respondents and for rejecting the defence of the railways. A similar ground has been raised in ground (f) of the memo of Appeal wherein the submission is that the arbitrator has not given any reason in writing in the award "for allowing the claims of the claimants vis-a-vis the claim of the Railway administration". The Appellants have, therefore, proceeded on the basis that the award is not a reasoned award. It was also urged before the Court, relying upon the observations contained in paragraph 5 of the impugned Judgment of the learned single Judge, that though it was urged before the learned single Judge that the arbitrator had failed to consider the defence of the railways or to apply his mind, the submission had not been considered.

6. In dealing with the award, it would merit emphasis that the principal bone of contention before the learned single Judge was that the arbitral Tribunal had not been validly constituted and the railways had been deprived of an opportunity of effectively representing their case

before the arbitrator. The submission was rejected by the learned single Judge and fairly that aspect of the controversy has not been raised in Appeal in the submissions urged before the Court. The Appellants have proceeded on the basis that the award of the arbitrator is not a reasoned award. That being the position, the Appellants are squarely governed by the principal of law laid down by a Constitution Bench of the Supreme Court in **Raipur Development Authority v. Chokhamal Contractors,** reported in AIR 1990 SC 1426. The Constitution Bench held that an award is not liable to be set aside merely on the ground of absence of reasons where the arbitration Agreement does not stipulate that reasons be given for the award. Unless the arbitration Agreement contains a stipulation as to reasons, the arbitrator was not under a legal obligation to furnish reasons in arbitral proceedings governed by the Arbitration Act of 1940. In the present case, it must be noted that it is not the case of the Appellants that the arbitration Agreement required the arbitrator to furnish any reasons for the award. No such stipulation was contained in the General Conditions of Contract, as they were in force at the relevant time.

7. Neither in the Arbitration Petition nor for that matter in the submissions that were urged before the learned single Judge was the contention raised to the

effect that the arbitral award was in the teeth of the contractual provisions. A perusal of the Judgment of the learned Single Judge would indicate that the ground that was urged was to the effect that the arbitrator had not furnished any reasons for the award. The learned Single Judge repelled the submission noting that the arbitral award recorded that the arbitrator had perused the pleadings, the documents produced by the parties, and the submissions advanced upon which the award had been passed. We are of the view that sitting as an Appellate Bench over the Judgment of the learned single Judge, this Court would not be justified in enlarging upon the scope of the controversy, particularly in the absence of any foundation in the pleadings to the effect that the arbitrator had ignored a material provision of the contract. Apart from a bald statement in ground (h) of the Arbitration Petition that the arbitral award was not reasoned, that the defence of the railway administration had not been considered, and that there was non-application of mind on the part of the arbitrator, there is no specific reference to any provision of the contract which was ignored. There is no factual or legal foundation in the pleadings. As a matter of fact there was no counterclaim. There is no challenge at all on the award of interest, in the pleadings. Absent a foundation in the pleadings, the Court in appeal cannot allow such a point to be raised.

In these circumstances, it would not be permissible for such a ground to be raised for the first time in an Appeal against the Judgment of the learned single Judge dismissing a Petition challenging the arbitral award. The point that the award is contrary to the provisions of the contract has not been urged squarely either in the petition or in the submissions before the learned single Judge. On the question of interest, there is not even a ground in the Arbitration Petition to challenge the award of the learned arbitrator.

8. For these reasons, we do not find any reason to interfere with the Judgment and Order of the learned single Judge. The Appeal shall accordingly stand dismissed. There shall be no order as to costs.

(Dr.D.Y.Chandrachud, J.) (R.M.S.Khandeparkar, J.)

sjs/j7aj706.98